Supreme Court, U.S.
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No. ____

In The

# Supreme Court of the United States

October Term, 1995

ROBERT PAPA,

*Petitioner,*

v.

NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,

*Respondent.*

## Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New York

## PETITION FOR A WRIT OF CERTIORARI

SCHAPIRO & REICH, ESQS.
*Attorneys for Petitioner*

PERRY S. REICH
Counsel of Record
325 East Sunrise Highway
Lindenhurst, NY 11757-2501
(516) 884-7600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Do so much of the provisions of New York Constitution, article VI, § 5, and New York Civil Practice Law and Rules 5501(c) that have been consistently construed by New York's highest court as authorizing an intermediate appellate court to reverse a determination made by a trial court on the facts, on the basis of a cold record, and to render a new final determination, without having seen or heard the witnesses or directing a new hearing, violate the due process clause of the United States Constitution?

2. Is the due process clause to the United States Constitution violated where, in a child neglect proceeding, the trier of the facts dismisses the charge, finding that the petitioner failed to meet the burden of proof, a second judge who hears similar proof in a related matter makes the same finding, and a state appellate court, without seeing or hearing the witnesses, holds the charge established by substituting its view of credibility as there is no physical evidence corroborating the charge, or does the due process clause preclude an appellate court from making new dispositive factual findings where it has not seen or heard the witnesses?

3. Does New York Family Court Act § 1046 violate the due process clause to the United States Constitution by providing a mere preponderance of the evidence standard in a child neglect proceeding, which may be met by hearsay statements of a child and "validation" testimony, or does the due process clause require the state to carry that burden by clear and convincing evidence?

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## OPINIONS BELOW

The majority opinion and the dissenting opinion of the Court of Appeals, not yet reported, appear in the appendix hereto. The order of the New York Court of Appeals dismissing the appeal on the ground that no substantial constitutional question was presented and granting permission to appeal on state law issues is reported at 85 N.Y.2d 921, 650 N.E.2d 1322, 627 N.Y.S.2d 320 (1995) and appears in the appendix hereto. The order of the Appellate Division, Second Department, denying reargument and permission to appeal to the Court of Appeals is not reported and may be found in the appendix. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, is reported at 179 A.D.2d 646, 578 N.Y.S.2d 252 (2d Dept. 1992) and may be found in the appendix hereto. The opinion of the Family Court of the State of New York, County of Nassau, was not reported and is attached to the appendix hereto. The opinion of the Supreme Court of the State of New York, County of Nassau, in a related habeas corpus proceeding, was not reported and is attached to the appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1995. No petition for rehearing was made. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*New York Constitution*, article VI, § 5:

> Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken which is authorized to review such judgment or order may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from, and each interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing.

*New York Civil Practice Law and Rules* 5501(c):

> The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance. . . .

*New York Family Court Act*, § 1046(b)(i):

> In a fact-finding hearing
>
> any determination that the child is an abused or neglected child must be based on a preponderance of the evidence.

## STATEMENT OF THE CASE

Petitioner, a New York City police officer, and Theresa Papa were married on September 20, 1985, and had two children together, Melissa, born January 29, 1986, and Jacqueline, born May 14, 1987. In 1988, Theresa began "seeing" a former boyfriend, and had sexual intercourse with him "too many times to count."

This caused some obvious tension in the marriage and a divorce action ensued. Theresa began a series of proceedings in 1989 in the Family Court in which she alleged that petitioner had threatened her with physical abuse. Though she did not confront petitioner about it, at or about the end of November or the early part of December, 1989, Theresa complained to the respondent that petitioner had abused either one or both of their children. This resulted in a referral to the North Shore University Hospital's Division of Child Psychiatry and Family Crisis unit, where the wife met with Yael Layish, a certified social worker.[1]

Although Layish was initially "unable to make a conclusive statement . . . regarding the sexual abuse allegation," following 7 or 8 sessions, Layish claimed that Melissa stated that she had been abused by her father.

At a hearing before Judge Murray Feiden in Family Court, the children's mother testified that Melissa had

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[1] Although the Appellate Division's opinion refers to Layish as "the independent court-appointed psychiatric social worker," as respondent conceded before the Court of Appeals, this statement is not correct. Layish was not appointed by the Court and has no psychiatric degree.

described repeated incidents of abuse of both children. Several medical doctors and mental health experts who had examined one or more of the family members testified that there were no physical signs of abuse and that they were unable to confirm or refute the allegation that Melissa had been abused by her father. Layish, based on her purported expertise, claimed that the petitioner had engaged in abuse. When interviewed by Judge Feiden in camera, Melissa declined to make any allegation of abuse, and the law guardian believed that the child had been programmed: "maybe it was . . . with a little pressure, but she [Melissa] did say to me that her mommy told her what to say."

Respondent testified on his own behalf and denied sexually abusing his daughters. His mother, who had supervised the children's visits with their father, testified that Melissa never complained to her of any problems with respondent. A psychologist, Dr. Monty Weinstein, who had addressed the New York State Legislature on the subject of false charges of child abuse, testified that Layish lacked competence to make a diagnosis and, based on two observations of the children and their father, that the allegations of abuse were unfounded.

At the conclusion of the fact-finding hearing, Family Court found "that the allegations of the petition [were] not . . . sustained by a burden of proof. . . . I carefully weighed the evidence all around and find that the preponderance that is required by the statute was not met." Respondent appealed the determination to the Appellate Division.

Before the appeal was heard, petitioner brought an application for a writ of habeas corpus for visitation in Supreme Court, Nassau County. After an 11 day hearing, Justice John Burke granted the writ, on December 19, 1991, insofar as it sought visitation. Justice Burke viewed the videotape of the interviews conducted by Layish and conducted an interview of the child. He found, among other things, that they "involve[d] elements which reflect a degree of preparedness and a lack of spontaneity." He also noted that the allegations were raised by the wife while she was engaged in adulterous conduct that led to divorce litigation.

About a month later, on January 13, 1992, the Appellate Division, Second Department, reversed the order of Family Court, *on the facts*, in a memorandum opinion, and deemed the allegations of child abuse established. Reassessing credibility, that Court found Layish's testimony "highly reliable" and petitioner's evidence "unpersuasive." A motion for reargument and leave to appeal to the Court of Appeals, in which Justice Burke's determination was called to the Court's attention, and in which petitioner argued that it was unconstitutional to reverse on the facts without having heard or seen the witnesses, was denied, and the matter remitted to Family Court for a dispositional hearing.

Acting on constraint of the Appellate Division order, Family Court, on October 26, 1994, essentially precluded any contact between petitioner and his children.

Petitioner sought to appeal to the Court of Appeals as of right on constitutional grounds, asserting, among other things, that the due process clause precluded an

appellate court from reversing findings of non-abuse by judges who saw and heard the witnesses and, despite an earlier holding of the New York Court of Appeals to the contrary, that the proper constitutional standard to be applied in a child neglect proceeding was clear and convincing, rather than a preponderance, of the evidence.

On April 4, 1995, the Court of Appeals dismissed the appeal taken as of right "upon the ground that no substantial question is directly involved" and granted a motion for permission to appeal. Petitioner renewed his constitutional arguments in the Court of Appeals.

On November 1, 1995, a majority of the Court of Appeals affirmed the order of the Appellate Division in a memorandum opinion. Though noting that the case involved a pure question of credibility, the majority "conclude[d] that the weight of the evidence more closely comports with the Appellate Division's determination. . . . Layish's testimony corroborated the child's out-of-court statements of abuse and, along with the other evidence presented, provided sufficient support for a finding of abuse against respondent, even though the acts charged by their nature did not result in physical injury. . . . " Judge Smith dissented, finding Layish's methods wanting, and voted to remit for further proceedings.[2]

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[2] Following the decision of the Court of Appeals, respondent obtained an order of the Family Court precluding any contact between the petitioner and his children until they reach the age of 18 years. A copy of the respondent's petition to that Court may be found in the appendix hereto.

## REASONS FOR GRANTING THE WRIT

### A. The Decision Below Permitting an Appellate Court to Reassess Credibility on a Cold Record Conflicts with Decisions of Other Federal Appellate Courts Construing the Analogous Provisions of the Federal Magistrate's Act and Involves an Issue Left Open and Described By this Court as "Serious"

Under article VI, § 5, of the New York Constitution and N.Y Civil Prac. L. & R. 5501(c), as authoritatively construed by the New York Court of Appeals on several occasions, an intermediate appellate court in New York may reverse a determination on the facts, reassess credibility, and direct the entry of judgment accordingly, without having seen or heard the witnesses. *Northern Westchester Professional Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499, 458 N.E.2d 809, 470 N.Y.S.2d 350 (1983); 7 Weinstein-Korn-Miller, N.Y. Civ. Prac., para. 5501.20 (Matthew Bender 1995). This practice is routinely claimed by the New York appellate courts in matters of this sort, *e.g., Matter of Tiffany F.*, 205 A.D.2d 429, 613 N.Y.S.2d 631 (1st Dept. 1994) (reversing dismissal and directing finding of abuse), and was precisely the course followed in this case.

In *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980), this Court, in construing the parallel provisions of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), which similarly provided for *de novo* review, left this issue open, but viewed it as troublesome:

> The issue is not before us, but we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the

> judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

*See, Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989) ("Had the district court rejected the magistrate judge's conclusions regarding the credibility of central witnesses without hearing live testimony from those witnesses, troubling questions of constitutional due process would have been raised.")

The principle that "one that decides must hear," *Morgan v. United States*, 298 U.S. 468, 481 (1936), requires the judicial system to afford deference to the finder of fact who hears the live testimony of witnesses because of the opportunity to judge the credibility of those witnesses. *See, Wainwright v. Witt*, 469 U.S. 412, 434 (1985); *Marshall v. Longberger*, 459 U.S. 422, 434 (1983); *United States v. Oregon Med. Socy.*, 343 U.S. 326, 339 (1952); *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980). Thus, the constitutional principle should be that an appellate court may not reject a factual finding made by a trier of the facts following an evidentiary hearing, where the finding is based on the credibility of a witness testifying before the trier of the facts and the finding is dispositive of the case. *See, Hill v. Beyer*, 62 F.3d 474, 482 (3d Cir. 1995).

The determinations in this case rested squarely on an assessment of credibility. Unlike New York, where reversals on the facts are routine, *e.g., Matter of Tiffany F.*, 205 A.D.2d 429, 613 N.Y.S.2d 631, *supra*, other State courts of last resort have emphasized that, on an appeal by the State in a matter of this sort, the findings of the trial judge, who had the opportunity to see the witnesses and

assess their demeanor in determining credibility, are practically impervious to attack. *See, Matter of Swartzfager*, 290 Or. 799, 626 P.2d 882, 888 (1981); *cf. Steven L.H. v. Sherry L.H.*, ___W.Va.___, ___S.E.2d___, 1995 WL 87940 (1995) (reversing and applying rule to sustain finding of abuse). Indeed, given the well-known possibility of suggestiveness and coaching, by parent and expert, *see, State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994), a matter touched upon by Judge Smith in the course of his dissent below, it is evident that viewing of the witnesses is absolutely vital.

Had such deference been applied, as petitioner submits is constitutionally required, the determination of Family Court would have to be sustained. *See, Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 577 (1985) (findings of fact and inferences drawn may not be overturned on cold record where there is evidence to support them, even if appellate court is inclined to make different findings or draw contrary conclusions); *Beck v. QuickTrip Corp.*, 708 F.2d 532, 535-536 (10th Cir. 1983) (findings of fact may be adequate even if they are not exhaustive when the record supports those findings of fact). There was an ample basis to uphold the determinations of *two* judges who saw and heard the witnesses. Seeing and hearing the witnesses clearly made a difference in this case.

In short, this case presents this Court with the perfect opportunity to resolve the issues left open in *Raddatz*.

**B. The Decision of the Court Below Sustaining the Constitutionality of a State Statute Directing a Court to Find Child Abuse Based on a Preponderance of the Evidence as Opposed to Clear and Convincing Proof Conflicts with Decisions of Other State Courts and is in Tension with Decisions of this Court**

In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court held that, as a matter of due process of law, in a proceeding to terminate parental rights, the State has the burden of establishing unfitness by clear and convincing evidence. Whether that standard should be applied to an abuse proceeding, which will result in a loss of custody, but not an immediate termination of all parental rights, is an issue that has divided courts of last resort.

New York Family Court Act § 1046(b)(i) provides, in a neglect proceeding, that the burden of persuasion is a mere preponderance of the evidence. In *Matter of Tammy Z.*, 66 N.Y.2d 1, 484 N.E.2d 1038, 494 N.Y.S.2d 686 (1985), the New York Court of Appeals distinguished *Santosky* on the ground that a neglect proceeding was different than a termination proceeding, and held the statute constitutional. Later New York cases have adhered to the holding, and, in fact, have permitted the lesser standard to be met on hearsay statements, provided they are "corroborated" by other proof, such as "expert" opinion "validation" testimony. *Matter of Christina F.*, 74 N.Y.2d 532, 548 N.E.2d 1294, 549 N.Y.S.2d 643 (1989); *Matter of Nicole V.*, 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987).

To be sure, several courts agree with this analysis, *see Matter of N.H.*, 569 A.2d 1179, 1182 n.3 (D.C.App. 1990) (collecting cases); *August H. v. State*, 105 Nev. 441, 777

P.2d 901, 903 (1989). Other State courts, however, hold that the constitutional standard of proof required to support any "order *limiting or terminating* parental rights to custody of minor children is clear, cogent and convincing proof." *Matter of Schoffstall*, 179 W.Va. 350, 368 S.E.2d 720, 722 (1988), quoting from *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973) (emphasis supplied). *Accord, In re Interest of D.S.*, 217 Ga.App. 29, 456 S.E.2d 715 (1995); *State in Interest of August*, 503 So.2d 717 (La. App. 3d Cir. 1987); *Care and Protection of Three Minors*, 392 Mass. 704, 711-712, 467 N.E.2d 851, 857 (1984); *Custody of Michael*, 28 Mass.App. 260, 549 N.E.2d 440, *rev. denied*, 407 Mass. 1101, 552 N.E.2d 863 (1990); *In re Interest of I.M.B.*, 897 S.W.2d 146, 148-149 (Mo.App. 1995); *In Interest of E.J.*, 741 S.W.2d 892 (Mo. App. 1987); *Matter of Welfare of J.W.*, 391 N.W.2d 791, 796 (Minn.), *cert. denied sub. nom. Sherry v. Bureau of Social Services of Hennepin County*, 479 U.S. 1040 (1986); *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 55 (1991); *Elmer v. Lucas County Child Services Bureau*, 36 Ohio App.3d 241, 244, 523 N.E.2d 540, 543 (1987); *Interest of J.M.*, 438 Pa. Super. 409, 652 A.2d 877, 881 (1995) (collecting cases); *Interest of Palmer*, 404 Pa. Super. 314, 590 A.2d 798 (1991).[3]

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[3] The standard followed in Illinois is not clear. The Illinois Appellate Courts have said that the ultimate standard is preponderance, not beyond a reasonable doubt, but seemingly have required the State to prove an element of its case, unfitness, by clear and convincing evidence. *See, Interest of Brunker*, 139 Ill.App.3d 232, 487 N.E.2d 397 (5th Dist. 1985); *Matter of Prough*, 61 Ill.App.3d 227, 376 N.E.2d 1078, 1082 (4th Dist. 1978); *In re Gonzalez*, 25 Ill.App.3d 136, 323 N.E.2d 42, 46 (1st Dist. 1975).

The courts applying the clear and convincing standard refuse to make any distinction between a termination of parental rights and a suspension of custody. In their view, all State interferences with parental rights must be measured by the clear and convincing standard. They reason that there is a simple, but well-founded, presumption that every parent is fit, and that there are collateral consequences to a finding of neglect or abuse. The determination may result in long-term forfeiture of a right to visit or raise one's children, and stigmatization or loss of employment. That is precisely what occurred here.

Applying the analysis set forth in *Santosky* and other decisions of this Court strongly suggests that the intermediate standard of proof is warranted in a matter such as this. Obviously more than money is involved. Child abuse, which can lead to a criminal prosecution in New York and elsewhere, is a serious charge.

Moreover, even in States where the preponderance standard is applied, proof such as that offered here – hearsay and "opinion" of a social worker – has been found insufficient. See, *Interest of Brunker*, 139 Ill.App.3d 232, 487 N.E.2d 397 (5th Dist. 1985). Certainly, where the "opinion" is formed only after a series of sessions with a young child subject to suggestion, the weakness of such proof is evident. See, *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372, *supra*.

Even if one were to assume that due process permits an appellate court that has not seen or heard the witnesses to reassess credibility, the evidence in this case could, in no sense, meet a standard of clear and convincing evidence. Thus, the case is an ideal candidate to

determine the constitutionally required standard of proof.[4]

## CONCLUSION

For these reasons, the petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

DATED: November 22, 1995

Respectfully submitted,

SCHAPIRO & REICH, ESQS.
*Attorneys for Petitioner*

PERRY S. REICH
Counsel of Record
325 East Sunrise Highway
Lindenhurst, NY 11757-2501
(516) 884-7600

[4] The issue was apparently presented in *Davis v. Page*, 442 F. Supp. 258, 266 (S.D. Fla. 1977), *affd.* 618 F.2d 374 (5th Cir. 1980), *on rehearing en banc* 640 F.2d 599 (5th Cir. 1981), *vacated. sub. nom. Chastain v. Davis*, 458 U.S. 1112 (1982), *on remand* 714 F.2d 512 (5th Cir. 1983), *cert. denied sub. nom. Davis v. Gladstone*, 464 U.S. 1052 (1984), but not resolved.

## MAJORITY AND DISSENTING OPINIONS OF NEW YORK COURT OF APPEALS

IN THE MATTER OF JACLYN P. (ANONYMOUS), ET AL. NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT, ROBERT P. (ANONYMOUS), APPELLANT.

No. 217
Decided November 1, 1995

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

Perry S. Reich, for Appellant
Bernadine M. Koch, for Respondent
Kenneth G. Munnelly, law guardian
Juvenile Rights Division of The Legal Aid Society, amicus curiae

MEMORANDUM:

The judgment appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs.

In this child protective proceeding, petitioner Department of Social Services commenced proceedings against respondent-father alleging that he had sexually abused and neglected his two young daughters, Melissa and Jaclyn. At a hearing before Family Court, the children's mother testified that her daughter Melissa had described repeated incidents of respondent's abuse of both children. Several medical doctors and mental health professionals who had examined one or more of the family members testified that there were no physical signs of abuse and that they were unable to confirm or refute the allegation that Melissa had been abused by her father.

The "validation" testimony (see, *Matter of Nicole V.*, 71 NY2d 112) was provided by Yael Layish, a certified social worker who had interviewed Melissa extensively, using anatomically-correct dolls and a technique called the "Sue White protocol." Layish ultimately obtained detailed descriptions from Melissa of incidents of abuse that had been directed against her and her sister. Based on her professional judgment, Layish concluded that these descriptions were accurate and reliable.

Respondent testified on his own behalf and denied sexually abusing his daughters. His mother, who had supervised the children's visits with their father, testified that Melissa never complained to her of any problems with respondent. A psychologist and family therapist hired by respondent testified, from two observations of the children and their father, that the allegations of abuse were unfounded.

Family Court dismissed the abuse and neglect petition, declaring simply that "the evidence was absolutely even." On appeal, however, Family Court's order was reversed by the Appellate Division which, after evaluating the testimony of each witness (179 AD2d 646), concluded that Layish's testimony, along with the other evidence, provided a sufficient ground for a finding of abuse. The court found Layish's testimony "highly reliable" and respondent's evidence "unpersuasive," and determined that the evidence preponderated in favor of the presentment agency (see Family Court Act §§ 167; 1046; *Matter of Tammie Z.*, 66 NY2d 1, 3). After a dispositional hearing, respondent took the present appeal by permission of this Court.

On the central legal question presented by this appeal, we conclude that the weight of the evidence more closely comports with the Appellate Division's determination (see, CPLR 5501[b]; see also, *Matter of Shelia G.*, 61 NY2d 368, 386; *Matter of Hime Y.*, 54 NY2d 282, 286). Layish's testimony corroborated the child's out-of-court statements of abuse and, along with the other evidence presented, provided sufficient support for a finding of abuse against respondent, even though the acts charged by their nature did not result in physical injury such as that found in *Nicole V.* Respondent's remaining contentions are either without merit or unpreserved[1].

SMITH, J. (dissenting):

Because I believe the majority has not adequately addressed the issues raised in this proceeding, I dissent.

The Nassau County Department of Social Services commenced this child protective proceeding alleging that appellant, Robert P., sexually abused and neglected his two daughters, Jaclyn P. (age 2 at the time of the incidents alleged here) and Melissa P. (age 3 at the time of the incidents alleged here). A preliminary evaluation was conducted of Melissa by Yael Layish, a certified social

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[1] Contrary to the dissent, the trial court found Layish qualified as an expert in "child sexual abuse" as well as qualified to corroborate Melissa's out-of-court statements. The Appellate Division affirmed [sic] and we find no error of law. Moreover, in that no objection was made to Layish's testimony regarding her use of anatomically correct dolls, we cannot and do not pass on that technique. The legal arguments now raised by the dissent and by appellant were not pressed at the trial level.

worker. After three visits, Layish was unable to conclude that Melissa was abused. Layish continued as Melissa's therapist and after approximately seven or eight visits following the initial evaluation, Melissa stated that she had been sexually abused by her father

The first issue raised by the appellant concerns the qualifications of the expert. Appellant contends that the qualifications of Layish to give expert corroborative testimony were never established. Specifically, the appellant argued that Layish could give testimony about Melissa's out-of-court statements but was not qualified to give an opinion as to whether or not the child had been sexually abused, in part, because she was a social worker and not a psychiatrist or psychologist. The Family Court ruled only "that she is an expert in the area of sex – child sexual abuse" . It did not specifically address the issue of her expertise in a case involving corroboration of alleged sexual abuse where there were no physical findings of sexual abuse.

This case is different from that of *Matter of Nicole V.* (123 AD2d 97, affd 71 NY2d 211). There, the expert's qualifications to give corroborative, opinion testimony were not challenged and she "was qualified, without objection, simply as an expert in counseling sexually abused children" (123 AD2d at 99). This Court found that the out-of-court statements of the child, *Nicole V.*, were corroborated both by the testimony of the expert and by physical evidence. Where, as here, an expert's qualifications are challenged, the appropriate course is for the expert's prior contact with similarly situated children to be considered. In this case such testimony should include the expert's prior treatment of children of similar age,

alleged to have been sexually abused, where there was no physical evidence of sexual abuse. Additionally, testimony should include the expert's level of specialized training, the procedures utilized and the rationale for using them. Knowledge of methodologies generally accepted in the field is also relevant.

The second issue here involves the procedures used by an expert to determine whether or not a child has been sexually abused. Here appellant challenges the use of dolls by the expert in trying to determine if the child Melissa had been sexually abused. The use of the dolls in this case was challenged in the cross-examination of Layish when the appellant brought out that only the genitals of the dolls used were life-like while the other features of the body, such as nose, eyes and ears, were painted on the dolls, and there were no fingers or toes. The doll procedure was also challenged in the testimony of a psychologist called by the appellant, Dr. Monty Weinstein, who was specifically asked about, and who challenged, the procedures used by Layish with respect to anatomical dolls. In his summation in the Family Court, the appellant again raised the issue of the use of dolls by Layish. One of the appellant's points in his brief submitted to the Appellate Division was, "The use of anatomical dolls is not a reliable indicator of sex abuse." In this Court the appellant has once again raised the issue of the improper use of dolls by Layish.

The literature indicates that the use of dolls with pronounced genitalia may or may not influence a child's reaction to the dolls and may affect the credibility of the

determination that a child has been abused.[1] For these and other reasons, some courts do not permit the use of anatomical dolls in determining sexual abuse.[2] Here, there was no evidence of the acceptance or nonacceptance by the scientific community of the use of dolls in determining sexual abuse of children. The use of these dolls in the determination of sexual abuse is a controversial subject which has been clearly raised in this case and requires this Court's approval or disapproval after it appropriately weighs the opinions of the scientific community.

For these reasons, I would reverse the order of the Appellate Division and require a reopened hearing at which these issues are specifically addressed.

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[1] *See*, Levy, "Using 'Scientific' Testimony to Prove Child Sexual Abuse," 23 Fam. L.Q.383; Newman, "Assessing the Quality of Expert Testimony in Cases Involving Children," 22 J. Psychiatry & Contemp Law 181, 198.

[2] *Matter of Amber B.*, 191 Cal. App.3d 682, 236 Cal. Rptr. 623 (1987), *Matter of Christie D.*, 206 Cal. App.3d 469, 253 Cal.Rptr. 619 (1988)

* * *

Judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Levine and Ciparick concur. Judge Smith dissents and votes to reverse in an opinion.
Decided November 1, 1995

## ORDER OF COURT OF APPEALS DISMISSING APPEAL AND GRANTING PERMISSION TO APPEAL

MEMORANDUM [85 NY2d 921, 627 NYS2d 320]

In the Matter of Jaclyn P. and Another. Nassau County Department of Social Services, Respondent; Robert P., Appellant.

Submitted January 23, 1995;

Decided April 4, 1995

HISTORY

Reported below, 179 AD2d 646.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Motion for leave to appeal granted.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of a Proceeding under Article 10 of the Family Court Act Relating to

D.S.S. o/b/o JACLYN PAPA, b. 5/14/87 and MELISSA PAPA, b. 1/29/86

Children under Eighteen Years of Age Alleged to be Abused and Neglected Children

**Index No.**
**N 375-90**
**N 376-90**

**DECISION AND ORDER**

Petitioner – Nassau County Department of Social Services
by Carmen Buscemi, Asst. Dir.
Child Protective Services

Respondent – ROBERT PAPA, Father

*Necessary Party – District Atty., Nassau County

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In the Matter of a Proceeding under Article 8 of the Family Court Act Relating to

THERESA PAPA o/b/o MELISSA PAPA

Petitioner

-against-

ROBERT PAPA,

Respondent.

**Index No.**
**O-206-92**

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The Appellate Division, in a unanimous decision, reversed an order of this Court, entered April 23, 1991, reinstated the petition, and found the allegations of abuse were established by a preponderance of the evidence, and remitted the matter to this Court for a dispositional hearing.

The hearing was held on September 13, 1994 and continued uninterrupted except for a holiday, through September 23rd.

The petitioner called Dr. Marc Reubins and Dr. Howard Kirschen as witnesses. Dr. Reubins, a consulting psychiatrist, recommended the respondent continue in psychotherapy and that there be no contact between the respondent and his daughters until the therapist has had both father and daughter in the appropriate therapy and can explore their needs and deal with the issues involved should any type of visitation be considered. Dr. Reubins testified that initial visitation be in a therapeutic setting, with child and father in treatment.

Dr. Reubins felt that there should be an attempt to reunite the respondent with his daughters and his wife unless the respondent is a "rabid dog." The witness was of the opinion that cutting off the children from future visitation is not in their best interests.

Dr. Howard Kirschen examined respondent and members of his family and his recommendation on the finding of abuse is that the respondent receive treatment as a sex offender.

Rene Krieger, a professional in family counseling holding a MSW from Columbia University, testified that

she has been seeing Melissa since February 1992. During the sessions with her, Melissa has displayed anger at her father and told the witness she never wanted to see her father.

The Court conducted an in camera interview with Melissa during which only the Law Guardian, Louis Profera, was present. During this interview the Court found Melissa to be a bright eight year old girl who was well aware of why she was there and what was going on. She stated that she doesn't want to see her father, not because she is afraid of him, but because she is angry with him.

The respondent's treating psychologist, Jean Cirillo, testified on his behalf. She has been treating him for two years, twice a week for the fist six months and then weekly thereafter, since the respondent was accused of sexually abusing his daughter. In her opinion, the respondent is now able to deal with his problems and the child should be in therapy to learn how to deal with her feelings regarding her father. The witness testified Melissa can have a relationship with the father if visitation is supervised, even if she is angry with him. The respondent's therapist feels that it is important for a child to have a relationship with both parents. Ms. Cirillo admitted that respondent has not admitted to the sex abuse of his daughter and that she is not treating him as a sex offender.

The respondent testified at this hearing. He is bitter about the appeal court's decision and still denies any acts of sexual abuse. He has never felt anger toward Melissa and is willing to attend therapy and follow the advice of

the therapist which includes having only supervised visitations. The respondent refused to consider abuse treatment for people found guilty of sexual abuse.

Respondent's reputation on the job was supported by three of his fellow police offices who attested to his good character, honesty and popularity on the force and behavior under stress. Members of respondent's family, his brother, sister and mother also testified to his reputation as a kind, caring and gentle person.

The Appellate Court referred the matter back to this Court for a dispositional hearing to determine what order of disposition should be made. An investigation by the Probation Department and mental health evaluations have been made to assist the Court and have been used during the hearing.

Both Dr. Reubins and Dr. Kirschen based their recommendations on a finding of abuse. Dr. Reubins testified that respondent should continue in psychotherapy and there be no contact with the daughter until both are in appropriate therapy and the therapist can explore their needs and deal with the issues involved; and that only then can visitation be considered. Dr. Kirschen's recommendation was that the respondent receive treatment as a sex offender.

Respondent's psychologist, Dr. Cirillo, admitted she was not treating him as a sex offender because he has not admitted to the abuse of his daughter. However, even she felt that any visitation be under strict supervision and only after therapy to enable the child to deal with reuniting with the father.

It is also the Law Guardian's recommendation that the respondent and child should engage in therapy. He stated that Melissa's anger at her father for what he had done to her is so deep that she requires help and the respondent should bear the cost of the therapy to deal with this issue. Until the child and father have progressed through the various stages of this therapy, an order of protection with a stay-away direction should remain in place.

Thusly, the Court finds that the child, Melissa, is an abused child and that the child, Jaclyn, is a neglected child.

The respondent is placed under the supervision of the Department of Social Services for a period of one year, with the direction that he continue in therapy as directed by the Department of Social Services.

The Court further orders a permanent order of protection directing the respondent to remain away from the children, Melissa and Jaclyn, except as authorized by the Department of Social Services. In no event shall there be any contact between the respondent and the child Melissa until the respondent engages in appropriate therapy for sex abusers *and* the therapist for the child consents to supervised contact.

The Family Offense Petition brought by Theresa Papa o/b/o Melissa is marked settled in light of the Court's disposition of the Neglect Petition wherein an order of Protection is granted in favor of Melissa.

This constitutes the decision and order of the Court.

Dated: Westbury, New York
October 26, 1994

ENTER

/s/ George K. Decker
Hon. George K. Decker
J. F. C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND
JUDICIAL DEPARTMENT

6168N
B/nl

GUY JAMES MANGANO, P.J.
GERALDINE T. EIBER
SONDRA MILLER
DAVID S. RITTER, JJ.

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91-07413

In the Matter of Jaclyn P. (Anonymous), et al. Nassau County Department of Social Services, petitioner-appellant; Robert P. (Anonymous), respondent.

DECISION & ORDER ON MOTION

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Motion by the respondent (1) for reargument of the appeals from an order of the Family Court, Nassau County, entered April 23, 1991 and upon reargument, either affirm the order or remit the matter for a new fact-finding hearing, or in the alternative (2) to grant leave to appeal to the Court of Appeals from the order of this court, dated January 13, 1992, which reversed the order appealed from and remitted the matter to the Family Court for the purpose of holding a dispositional hearing.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with one bill of $100 costs.

MANGANO, P.J., EIBER, MILLER and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 2, 1992

MATTER OF P., JACLYN (ANONYMOUS)

**DECISION AND ORDER OF APPELLATE DIVISION**

Matter of Jaclyn P. (Robert P.) [179 AD2d 646, 578 NYS2d 252]

In the Matter of Jaclyn P. and Another. Nassau County Department of Social Services, Appellant; Robert P., Respondent.

Second Department,

(January 13, 1992)

In consolidated child protective proceedings pursuant to Family Court Act article 10, the petitioner and the Law Guardian separately appeal, as limited by their briefs, from so much of an order of the Family Court, Nassau County (Feiden, J.), entered April 23, 1991, as, after a hearing, dismissed the petition alleging abuse and neglect of Melissa P.

Ordered that the order is reversed insofar as appealed from, on the law and the facts, without costs or disbursements, the petition alleging abuse of Melissa P. is reinstated, the allegations in paragraphs 5a and 5b

thereof are deemed established, and the matter is remitted to the Family Court, Nassau County, for a dispositional hearing.

Robert P. is the father of Melissa P. and Jaclyn P. In or about July 1990 the petitioner Nassau County Department of Social Services commenced proceedings against the respondent, alleging that he had sexually abused and neglected both daughters. Relevant to Melissa, the petition alleged, inter alia, that Robert P. had committed acts of digital penetration, and that he had placed his penis in Melissa's mouth. After a fact-finding hearing, limited to the allegations of abuse pertaining to Melissa, the Family Court found that the petitioner had not met its burden of proof because the evidence was "absolutely even". The court dismissed both the petitions alleging abuse of Melissa P. and Jaclyn P. On this appeal, the petitioner and the Law Guardian challenge the court's findings which resulted in dismissal of the petition alleging abuse and neglect of Melissa. We find that the petitioner established that Melissa was an abused child, and we remit the matter to the Family Court, Nassau County, for a dispositional hearing.

The allegations of abuse of Melissa were based upon the child's out-of-court statements as well as upon the statements of her sister Jaclyn. It is well settled that such out-of-court statements, if adequately corroborated by evidence tending to establish their reliability, may support a finding of abuse (see, Family Ct. Act § 1046 [a] [vi]; *Matter of Christina F.*, 74 NY2d 532; *Matter of Nassau County Dept. of Social Servs. v. Steven K.*, 176 AD2d 326). Corroboration may be provided via the "validation testimony" of experts regarding their investigations of the

underlying complaints of abuse (*Matter of Nassau County Dept. of Social Servs. v. Steven K., supra; Matter of Linda K.*, 132 AD2d 149). Thus, sufficiently corroborated out-of-court statements may suffice to provide the requisite preponderance of the evidence by which the petitioner must establish its case (see, *Matter of Nicole V.*, 71 NY2d 112; *Matter of Latisha V.*, 175 AD2d 839).

At the fact-finding hearing, Melissa's mother testified that she first became aware of a problem in November 1989 when her niece and her daughter Jaclyn both reported, within approximately one week of one another, that Melissa had hurt each of them by placing her fingers inside their vaginas. When confronted, Melissa reported that she had been "playing the doctor game" taught to her by her father, the respondent. The mother testified that Melissa demonstrated this game by "vigorously" placing her fingers between the legs of a doll. Melissa's mother also testified that Melissa reported to her that her father had taught her "the weenie game" in which her father placed his penis in Melissa's mouth. Furthermore, the witness stated that Melissa was exhibiting behavioral problems such as wetting herself and that she was suffering from nightmares. Alarmed, Melissa's mother contacted the police and the New York State Child Protective Services (hereinafter CPS).

CPS caseworker Debra Ross testified that she saw Melissa twice monthly for a total of 25 visits. On one such visit, Melissa reportedly described the "doctor game" to Ms. Ross, demonstrating it by trying to "poke" her fingers between the legs of a stuffed animal. Melissa reportedly told Ms. Ross that the respondent touched her in the same manner. When Ms. Ross tried to inquire further,

Melissa ran from the room, carrying the stuffed animal. Melissa reportedly told Ms. Ross that she was afraid to be left alone with her father.

Pursuant to the recommendation of CPS personnel, Melissa was taken to see Yael Layish, a psychiatric social worker who serves on the "family crisis team" of North Shore University Hospital. Ms. Layish, who recounted her credentials in the field of child sex abuse and whose competence this court has previously acknowledged (see, *Matter of Nassau County Dept. of Social Servs. v. Steven K.*, 176 AD2d 326, 327, *supra*), testified that she first examined Melissa in December 1989. After introductory sessions to acquaint Melissa with anatomically- correct dolls, Melissa reported, and demonstrated to Ms. Layish, how, after undressing her, the respondent placed his fingers in her rectum and vagina, exposed his penis for Melissa to touch, and how he placed his penis in Melissa's mouth. Melissa told Ms. Layish that she wanted her father to stop playing the doctor game. Ms. Layish recounted other incidents during her therapy sessions with Melissa, and she detailed the five phases of child sex abuse syndrome. Upon consideration of all of the foregoing, Ms. Layish testified that, in her opinion, Melissa was acting in a manner consistent with that of a sexually abused child. She did not believe that Melissa had been "coached" into making these allegations.

Dr. Bruce Bogard, a pediatrician at Schneider's Children's Hospital of Long Island Jewish Medical Center, testified that he examined Melissa on February 9, 1990, for physical signs of sexual abuse. His rectal examination of Melissa disclosed nothing unusual, and her external genital structures were normal, showing no evidence of

trauma. Her hymenal opening, however, measured seven millimeters. Dr. Bogard explained that generally, the hymenal opening in a normal prepubertal child is less than five millimeters. Melissa's larger hymenal opening, Dr. Bogard testified, was consistent with sexual abuse but not necessarily indicative of abuse. Dr. Bogard explained, however, that sexual abuse may occur without resulting in physical findings and that digital penetration could occur without leaving a mark on the hymen. He stated that a finding of a hymenal opening greater than 10 millimeters would be more indicative of abuse, but that an opening of seven millimeters fell within a borderline area.

Dr. Howard Kirschen, a board-certified child psychiatrist, testified that he interviewed and evaluated Melissa, as well as Melissa's mother, father and younger sister Jaclyn. Dr. Kirschen testified that both parents exhibited personality disorders, and that Melissa was "an overall troubled child". Dr. Kirschen acknowledged that there was a possibility that Melissa had been "coached" into making false allegations against her father, and he acknowledged his reliance upon various reports of others involved in the investigation, including that of Ms. Layish indicating that Melissa had been abused. Nevertheless, it was Dr. Kirschen's opinion that Melissa showed signs consistent with being a victim of sexual abuse.

Testifying for the respondent, Dr. Mark Rich, a pediatric urologist, stated that he examined Melissa and found no physical evidence of sexual abuse. Dr. Rich stated that he found Melissa's genitalia to be normal, without any signs of physical abuse or trauma, and that the size of Melissa's hymen "was not particularly out of

the norm of what a normal little girl that age would have . . . approximately one finger breadth". Dr. Rich conceded, however, that physical evidence of abuse is "often" not present in victims of abuse and that the absence of such evidence does not rule out a finding of sex abuse.

Tracy Grossman, a consultant psychologist at the Nassau County Department of Forensic Services interviewed Melissa in February 1990 in connection with her parents' custody dispute. Dr. Grossman, whose inquiry was primarily directed at ascertaining Melissa's feelings about visitation with each of her parents, stated that Melissa showed no evidence of sexual abuse during the one session they were together; however, neither could Dr. Grossman rule out that such abuse had occurred.

Florence P., Melissa's paternal grandmother, testified that she supervised Melissa's visitation with her father. The witness recounted that at the end of the children's March 24, 1991, visit with their father, Melissa and Jaclyn both cried hysterically and stated that they hated their mother and refused to leave their father. On the ensuing weekends following that visit, however, the mother refused to permit the children to visit the respondent. The witness stated that Melissa never complained to her of any problems with the respondent.

Dr. Monty Weinstein, a psychologist and family therapist, testified that he observed Melissa and Jaclyn interact with their father on two occasions. He described a "warm, bonding nurturing type of relationship" between father and children. Based upon his observations of the interactions between the children and their father, Dr.

Weinstein opined that the allegations of abuse were unfounded, as abused children would not react to the abuser in the warm and loving manner Jaclyn and Melissa exhibited toward the respondent. Dr. Weinstein also criticized Yael Layish's methodology regarding her use of the anatomically-correct dolls, implying that Ms. Layish was predisposed to findings of abuse in situations where other validators would not find abuse. Dr. Weinstein further opined that the children's alleged refusals to visit with their father after the March 24, 1991, visit were the result of their mother's alienation of them against their father. However, Dr. Weinstein's observations occurred over a period of "a couple of hours", during which he never spoke to the children, nor did he at any time speak to their mother. Rather, Dr. Weinstein's conclusions rested almost exclusively upon his observations of the children interacting with the respondent, the very party paying his expert fee, who was aware that Dr. Weinstein was observing him at the time of his interactions with the children. Dr. Weinstein made no attempts to question the children as to whether or not they had been abused.

The respondent Robert P. denied that he sexually abused his children. Rather, he stated that the only times he ever touched his daughters' genital areas was in connection with cleaning them after changing their diapers or in bathing them. Furthermore, he asserted that the allegations of sexual abuse were fabricated by his wife, who was engaged in an extramarital affair and who was trying to influence future custody determinations.

Dr. Naomi Adler, a psychologist, testified as the court's expert witness. Dr. Adler saw the respondent over

several sessions in an attempt to evaluate his psychological condition. She noted that the respondent refused to submit to two of the tests that would have been administered as part of her evaluation, and she found him to be defensive and suffering from a nonspecified personality disorder. The respondent's refusal to cooperate fully prevented Dr. Adler from determining whether he was aroused by deviant sexual stimuli, and Dr. Adler offered no opinion as to whether or not the respondent had in fact abused his children.

In addition to the reports of the various expert witnesses received in evidence, the court conducted an in camera interview of Melissa. Melissa, however, refused to cooperate during this proceeding, and thus revealed nothing about the allegations of abuse.

At the conclusion of the fact-finding hearing, the court dismissed the petition, finding that the evidence was "even", and thus the petitioner DSS had failed to prove its case by a preponderance of the evidence. Beyond this succinct conclusory statement, the court did not expressly state the grounds for the dismissal as required by Family Court Act § 1051 (c) (see, *Matter of Erika M.*, 97 AD2d 847). Even assuming that the court had adequately detailed its findings of fact, however, we are not bound by those findings (see, Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1051, at 413). Although the determination of the trier of fact is entitled to appropriate deference, in this case we find that the weight of the evidence is so strongly in favor of a finding of sexual abuse that the petition should be sustained (cf., *Matter of Linda E.*, 143 AD2d 904).

To begin with, Melissa's mother recounted the allegations revealed to her by Melissa. Although these allegations arose within the context of a custody dispute, they were corroborated by the validation testimony of Ms. Layish, the independent court-appointed psychiatric social worker (see, *Matter of Nassau County Dept. of Social Servs. v. Steven K., supra*). Ms. Layish initially examined Melissa over three evaluation sessions in December 1989, and thereafter continued as her therapist for at least 40 sessions from January 1990 through the time of trial in March 1991. Ms. Layish's testimony is thus highly reliable, since she has had more than ample opportunity to observe and evaluate Melissa's repeated reports of abuse. Indeed, that Melissa told Ms. Layish of her father's abusive actions on several occasions only further serves to underscore Melissa's veracity, since it is unlikely that she could maintain such a consistent series of fabrications. Moreover, Dr. Bogard found that Melissa's hymenal opening measurement of seven millimeters, while not necessarily indicative of sexual abuse, was consistent with such a finding. We would note, however, that a finding of sexual abuse is not dependent upon corroborating physical findings (see, *Matter of Latisha V., supra; Matter of Linda K., supra*). Indeed, Dr. Bogard explained that digital penetration could occur without physical injury to the hymen and the petitioner's own expert, Dr. Rich, conceded that the absence of physical trauma does not rule out a finding of abuse. Dr. Kirschen, too, believed that Melissa was a victim of sexual abuse.

Other than the respondent's denials, the only evidence tending to support a finding that Melissa had not been abused was provided by the respondent's paid

expert, Dr. Weinstein. However, Dr. Weinstein's opinion that the respondent had not abused Melissa was based primarily upon his two observation sessions during which all parties, including the children, were aware of his presence. Moreover, although Dr. Weinstein was critical of Ms. Layish's methodology, his own investigatory techniques were arguably flawed since he never spoke to the children, and it was apparent from his testimony that Dr. Weinstein held Ms. Layish in low professional esteem. In short, we find that Dr. Weinstein's limited access to the children and the limited scope of his analysis renders his opinion unpersuasive. The respondent's other expert witnesses similarly do not persuade us that Melissa had not been abused by her father.

On balance, our review of the entire record leads us to conclude that the allegations of abuse were established by a preponderance of the credible evidence (Family Ct. Act § 1046 [b]; *Matter of Nicole V., supra*). Accordingly, we find that allegations 5a and 5b of the petition alleging that the respondent abused Melissa, are sustained, and we remit this matter to the Family Court, Nassau County, for a dispositional hearing.

Kunzeman, J. P., Eiber, Miller and Ritter, JJ., concur.

PRESENT:

Hon. NORMAN FEIDEN
Judge

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|---|---|
| In the Matter of a Proceeding under Article 10 of the Family Court Act<br>DSS OBO JACLYN PAPA & MELISSA PAPA<br>Children under the age of eighteen alleged to be abused/and or neglected by ROBERT PAPA<br>Respondent | Index No. N 375-90, N 376-90<br>ALL PURPOSE SHORT FORM ORDER<br>ORDER OF DISMISSAL<br>(Granted 4-18-91) |

Petitions having been filed in this Court under Article 10 of the Family Court Act alleging the above-named children are abused/and or neglected; and

The matter having duly come on to be heard before this Court and after hearing and a negative finding; it is

ORDERED, that the Petitions are hereby dismissed; and it is further

ORDERED, that all Temporary Orders are vacated.

ENTER,

/s/ Norman Feiden
J.F.C.

COLLOQUY

* * *

[p. 56] your client here? Is your client here?

MR. LAROUNIS: No, your Honor.

THE COURT: After examination of the testimony and the evidence submitted to – during the fact finding hearing, the court finds that the allegations of the petition have not been sustained by a burden of proof. And I want you to know that I carefully weighed the evidence all around and find that the preponderance that is required by the statute was not met by the Department of Social Services. It's my finding on the evidence that the allegation of sexual abuse could have happened and it could not have happened and on that basis the evidence was absolutely even and was not – and therefore there was not a preponderance. And therefore, I'm dismissing the petitions against the respondent.

All temporary orders are vacated.

MR. DEWITT: Thank you, Judge.

MS. JESKIN: Thank you, your Honor.

MR. DEWITT: With regard to visitation?

* * *

MEMORANDUM

SUPREME COURT: NASSAU COUNTY

I.A.S. PART 4

BY: BURKE, J.

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In the Matter of the Application of ROBERT P.,

Petitioner,

For a Writ of Habeas Corpus,

-against-

THERESA P.,

Respondent.

INDEX NO. 13006/91

DATED: 12/19/91

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WILLIAM P. DeWITT
Attorney for Petitioner
324 Farmingdale Road
West Babylon, NY 11704

PHILIP SANDS
Attorney for Respondent
1461 Franklin Avenue
Garden City, NY 11530

By writ of habeas corpus issued June 12, 1991, returnable August 15, 1991, the petitioner Robert P. sought that his wife, the respondent Theresa P., produce the parties' infant daughters, Melissa and Jaclyn, said to have been detained by the respondent, in order that the petitioner be awarded custody of or visitation with the said infants. By cross-petition returnable August 21, 1991, the respondent also seeks custody of the two children and seeks further that the petitioner's rights of visitation be terminated and that he be enjoined from all contact with the infants.

A hearing in respect of the writ and cross-petition was conducted by the court on August 21st, 22nd, 23rd and 26th and on September 3rd, 4th, 5th, 6th, 10th, 19th and 20th, 1991. It is noted that the respondent, in response to the writ, produced the infants in court on August 21st and that the court excused further appearance by the infants unless otherwise directed. Such a direction was later given requiring that the infant Melissa be produced for an *in camera* interview by the court alone, in chambers and on the record, on September 23, 1991. The interview conducted by the court on that date completed the hearing in this matter.

The parties to these proceedings are also the parties to a pending action for divorce, commenced in this court on July 5, 1989, in which the wife, the plaintiff therein, had moved for various forms of *pendente lite* relief. By short form order dated December 20, 1989, the court (Saladino, J.) directed that "[t]he questions of [temporary] custody, residence and visitation are referred to the Nassau County Probation Department and the Nassau County Department of Mental Health, Department of Mental Retardation and Developmental Disabilities, Forensic Services for the usual background study and psychological evaluation of the parties, the infant issue of the marriage, and any other persons that the Probation Department and/or Forensic Services deem necessary. * * * In furtherance of this proceeding, the division of Criminal Justice Services (DCJS) is hereby ordered to search its files for a criminal history record on the basis of the information provided by Probation, and to promptly deliver to them such criminal history record or a no record reply as appropriate. * * * "

* * *

Pursuant to such direction, certain confidential reports which were furnished the Justice ordering same, were inspected by the attorneys for both parties and made available to this court for purposes of the proceedings which are the subject of this determination. The status of the action makes clear that only the parties' competing claims to *temporary* custody and visitation are at issue here.

The parties were married on September 20, 1985. There are two children of the marriage: Melissa, born January 29, 1986 (now approaching 6 years of age); and Jaclyn, born May 14, 1987 (now age 4). Although marital discord began to develop in mid-1988 or earlier, resulting in the commencement of the matrimonial action in July of 1989, the parties and the children continued to reside together in the marital residence at 61 Cedar Street, Massapequa, New York, a home purchased in 1986, until the end of 1989.

The marital strife resulted not only in the commencement of the matrimonial action in this court but also in certain prior and subsequent proceedings in the Family Court of Nassau County in which, initially, the respondent sought orders of protection in 1987 and in September of 1988 following incidents of alleged threatened or actual physical abuse directed against her by her husband. On January 27, 1989 the Family Court issued a Temporary Order of Protection to each party against the other; and in November of 1989, following another alleged incident of physical abuse by the petitioner against the respondent on November 18, 1989, she sought a permanent Order of Protection in Family Court.

In or about the end of November or the early part of December, 1989, the respondent wife complained to the Division of Child Protective Services of the Nassau County Department of Social Services that her husband, the petitioner herein, had sexually abused either one or both of the parties' children. The substance of the respondent's allegations presented to that agency was, generally, that the older child, Melissa, was observed "playing doctor" with her sister and with a female cousin of comparable age, causing the respondent to suspect that Melissa's father was implicated in the child's behavior. The precise date or dates of these behavioral manifestations is not known to this court except that the respondent testified to what she observed and was informed of by Melissa in late November of 1989, as a consequence of which, she testified, she reported the information to a 7th Precinct detective of the Nassau County Police Department and then sought assistance from the office of Child Protective Services [CPS], where it appears she registered formal allegations of sex abuse against her husband on December 5, 1989. That agency, in turn, referred the respondent to North Shore University Hospital's Division of Child Psychiatry and Family Crisis Unit for an evaluation of Melissa.

Melissa was then seen in that Division of the hospital by Mrs. Yael Layish, a certified social worker, whose functions as an employee of the hospital include the evaluation and treatment of family members, including troubled and sexually abused children. Mrs. Layish's evaluation of Melissa was conducted at three sessions held on December 14, 20 and 21, 1989. On January 2, 1990, following the three evaluation sessions with Melissa in

December of 1989, Mrs. Layish forwarded to CPS a report (Exhibit 8), co-signed by another social worker at North Shore University Hospital, setting forth the substance of the evaluation interviews and concluding in part that "[w]hile [Melissa] did not speak about or play out specifics of alleged sex abuse, there was evidence of a preoccupation with sexual themes in a manner that is consistent with children who have been sexual abuse victims. * * * While we are unable to make a conclusive statement at this time regarding the sexual abuse allegations, we believe what Melissa has presented so far warrants further evaluation. At this time the allegations cannot be ruled out."

The same report recommended that Melissa continue in "extended evaluation in the form of play therapy"; that "[s]upervised visitation of both children with father should continue pending the outcome of the evaluation"; and that "[s]upervision should be done by an independent person or agency acceptable to both parents, in order to minimize the children's risk of exposure to conflict with the parents."

On January 18, 1990, whether in a continuation of the same Family Court proceeding commenced two months earlier or in a new proceeding brought in that court, the respondent was issued a further Temporary Order of Protection requiring that the petitioner stay away from the respondent and children and limiting the petitioner to Sunday visitations from 10:00 A.M. to 7:00 P.M., supervised by his mother, the children's paternal grandmother. In response to the order, the petitioner moved from the marital residence. While the January 18, 1990 order is not represented to have resulted from the evaluation report

submitted by Mrs. Layish on January 2nd, it is apparent that the terms of the order are consistent with, if not in response to, the recommendations made to CPS.

Although Mrs. Layish at the completion of evaluation was unable to render a conclusion regarding the respondent's allegations of sexual abuse, she continued to see Melissa in therapy sessions which since have been conducted on as close to a weekly schedule as has been practicable – with allowance for vacations and illnesses – from January 17, 1990 through August 2, 1991 and presumably in sessions after that date based on the fact that Melissa's therapy is described as ongoing to the present time.

Mrs. Layish has testified fully to the substance of that which she heard and observed in the course of the three initial evaluation sessions and in some 49 therapy sessions thereafter. Her observations, certain dialogue with the child and various of Mrs. Layish's comments and conclusions appear in her handwritten Progress Notes prepared contemporaneously with or close to the time of each session (Exhibit O).

It should be noted that Melissa was 3 years 10 1/2 months of age at the time of the first session on December 14, 1989 and 5 years 6 months of age on the date of the last session to which Mrs. Layish testified, viz., August 2, 1991. It is also noted here that the parties' younger child Jaclyn was neither evaluated nor seen for purposes of therapy by Mrs. Layish.

In the course of the sixth and seventh therapy sessions with Melissa on March 12, 1990 and March 21, 1990, during which, according to Mrs. Layish's testimony,

Melissa verbally described, demonstrated with anatomical dolls and "played out" specific acts of sexual abuse in which she had been engaged by her father, Mrs. Layish forwarded to the Probation Department her second written report dated March 27, 1990 (not in evidence but known to the parties and included in the confidential forensic materials furnished the court), detailing the acts of abuse elicited from the child and recommending that any contact between the father and child "be supervised by an independent agency such as CPS or EAC [Education and Assistance Corporation]".

On May 3, 1990 a superseding Order of Protection was issued by the Family Court in a Family Offense proceeding then initiated in that court by the respondent, the terms of that order again directing that the petitioner stay away from the respondent and children but authorizing supervised visitation by the petitioner upon terms identical to those provided in the January 18, 1990 Temporary Order of Protection.

On June 13, 1990, Yael Layish prepared and forwarded an "updated report" to CPS (Exhibit C) in which the substance of the March 12 and March 21, 1990 therapy sessions with Melissa was repeated and further information relative to subsequent sessions through June 12, 1990 was proffered. Mrs. Layish concluded her report as follows: "It is my opinion that Melissa's play, behavior, and verbalizations are consistent with those of sexually abused children. In addition, the phases of Sgroi's Child Sexual Abuse Syndrome are present. I would therefore recommend continued individual therapy. I would also recommend supervised visitation under the supervision of a neutral non-family member or at EAC."

In July of 1990 the Nassau County Department of Social Services, by separate petitions filed in the Family Court, commenced Child Abuse and Neglect proceedings alleging as to both Melissa and Jaclyn that their father, the petitioner herein, had committed specific sex offenses "as defined by penal law" against his children. The petitions alleged in part the conclusion stated by Yael Layish in her June 1990 report (Exhibit C) and further alleged in each petition, in citing such conclusion: "Thus, [the father] committed or allowed to be committed a sex offense as defined by penal law against said child".

By the time the Child Abuse and Neglect proceedings were brought, Yael Layish had conducted eighteen therapy sessions with Melissa. From July 10, 1990 thru September 4, 1990, six additional sessions of like kind were held. On September 6, 1990, on referral from Mrs. Layish, Dr. Nina Gurevich, a staff psychiatrist at North Shore University Hospital's Department of Psychiatry, Division of Child and Adolescent Psychiatry, conducted a mental status examination with respect to Melissa and prepared a report regarding same (Court Exhibit I). Said report, which is primarily descriptive of Melissa's behavioral problems, sleep disorder and her development of eneuresis, indicates that during at least a portion of the examination the respondent was present with the child to discuss her allegations of sex abuse and that Melissa was not only a listener but also a participant in that discussion.

In the section of Dr. Gurevich's report entitled "Summary and Formulation" appears the following:

> " * * * The phenomenologic description of Melissa's symptoms fits DSM III-R diagnostic criteria of Post-Traumatic stress disorder. The persistence of the symptoms suggests that distressing events in her life were very severe and continue to occur. It is obvious, that Melissa remains very much caught up in her parent's conflicts. The severity and nature of her initial psychosocial stressor, alleged sex abuse makes her condition very difficult to treat."

Dr. Gurevich's diagnosis that the child was then suffering post-traumatic stress disorder is followed by the following recommendations:

> "1) I would recommend continue individual psychotherapy with Melissa on at least once a week basis. I would also recommend educational approach for Melissa's mother to help create more structured and consistent environment at home and help her understand Melissa's developmental needs.
>
> However, it is unrealistic to believe that only following those recommendations will be adequate for Melissa. The most important intervention would be creating a safe environment for her."

Melissa's therapy with Yael Layish thereafter continued in 16 sessions from October 9, 1990 thru March 22, 1991, following which the pending Child Abuse and Neglect proceedings were tried before Judge Norman Feiden in the Family Court of Nassau County. There, as here, Yael Layish was a principal witness. After a full hearing and a "negative finding", Judge Feiden, by order dated April 18, 1991, dismissed the petitions and vacated all temporary orders.

From April 10, 1991 through August 2, 1991, Melissa was seen by Mrs. Layish in nine additional therapy sessions prior to the commencement of the hearing before this court. The last of those sessions was videotaped by Mrs. Layish with the purported written consent of the respondent. According to Mrs. Layish's testimony, the videotape, admitted in evidence as Exhibit F and placed under seal by the court, records the entire session conducted with the child. Mrs. Layish testified that the tape was made at her suggestion and that its principal intended uses were to utilize the film for staff-training at the hospital; to memorialize Melissa's opposition to seeing her father (a preference said to have been made clear in the course of therapy but not expressed to Judge Feiden in the Family Court proceedings four months earlier); and to impress upon the child that her statements were "important".

It is here noted that during the course of the hearing Exhibit F. was viewed privately by Mrs. Layish, by the petitioner and his attorney and by the court.

As presented in support of the respondent's case, Yael Layish's testimony emphasizes the evaluation session of December 20, 1989, and the therapy sessions of March 12, 1990, March 21, 1990, June 18, 1990, November 16, 1990 and August 2, 1991, the last being videorecorded. By contrast, all, or nearly all, of the 52 sessions conducted with Melissa were more fully explored on cross-examination based chiefly upon the contemporaneously prepared Progress Notes. The psychotherapy format employed by Mrs. Layish was, consistently, one of play therapy, involving the child's use of puppets, dolls and other playthings, during which the therapist stated she avoided

a question-and-answer regimen and sought to query the child only for the purpose of having her explain that which she was "playing out". It was testified that Melissa's spontaneous statements, in words or substance, were thus incorporated in the Progress Notes, together with certain of Mrs. Layish's observations of the child's behavior during therapy.

There is little doubt that a substantial part of the therapist's records, including certain drawings made by Melissa in the course of therapy (Exhibits E-1 through E-18), reflect a sexual theme either in the verbal expressions attributed to the child or in the interpretations given the child's words or acts by the therapist-observer; and in a limited number of instances (e.g., March 12, 1990, March 21, 1990 and August 2, 1991) Melissa is noted as having described specifically certain conduct of a flagrant explicit sexual nature committed by and with her father, with the child using in those and other sessions, child-adaptable, but otherwise meaningless, terms or euphemisms to denote the private parts of her own body and that of her father. In a broader sense, the chart reveals that the child's verbal expressions and playing-out during the course of therapy repeatedly focus upon her fear of her father and her rejection of him; his counseling that she keep their sexual conduct a "secret" or risk that he will die or not see her; her need to be protected from him. In addition, much of the 20-month period of therapy is marked by Mrs. Layish's notation of Melissa's behavioral problems, anxieties and sleep disorders and of the child's repeated concerns with the theme of her parents fighting and not living together.

The earliest written report from North Shore University Hospital, dated January 2, 1990 (Exhibit 8), refers to the social workers' efforts to procure Melissa's comments and reactions to her mother's suspicions concerning the petitioner's behavior with the child, particularly as it concerned the child's knowledge of the "doctor game". In part the report concluded that "[t]here were behavioral indicators of anxiety when the [the respondent's] allegations [of sexual abuse] were explained. * * * It was also clear that there was a great deal of anxiety around her parents' marital contact * * * . Both clinicians hold the opinion that Melissa's avoidance of exploring the allegations was related to her concern that the 'doctor game' was in some way connected to her not seeing her father and to her parents not living together. While she did not speak about or play out specifics of alleged sex abuse, there was evidence of a preoccupation with sexual themes in a manner that is consistent with children who have been sexual abuse victims."

The evaluating social workers added that "[w]hile we are unable to make a conclusive statement at this time regarding the sexual abuse allegations, we believe what Melissa has presented so far warrants further evaluation. At this time the allegations cannot be ruled out." They recommended, nevertheless, that supervised visitation of both children with their father should continue.

In her next report dated March 27, 1990, following the emphasized therapy sessions of March 12th and March 21st, in which descriptions of particularly egregious physical contacts of a sexual nature between father and child were reportedly described and demonstrated by Melissa, it was recommended by Mrs. Layish

that contact between the petitioner and his daughter be supervised by an independent agency "[i]n view of these additional allegations made by Melissa * * * ."

In her last report dated June 13, 1990 (Exhibit C), Yael Layish referred again to the sessions of March 12 and March 21, 1990, her pursuit of those disclosures in subsequent sessions and the child's playing out her rejection or disapproval of the sexual theme "games" learned from her father and his cautioning secretiveness about those activities. Mrs. Layish stated her opinion that Melissa's play behavior and verbalizations are "consistent with those of sexually abused children". She recommended "supervised visitation under the supervision of a neutral non-family member or at EAC [Education and Assistance Corporation]."

Despite the absence from the three foregoing reports of any finding, conclusion or opinion that the petitioner sexually abused his child, Yael Layish testified in the current proceeding to her opinion that he did in fact do so. While it has not been established that her testimony before the Family Court in March of 1991 included such a finding or opinion, it may fairly be assumed that she did so testify since the Child Abuse petitions presented to that court by the Department of Social Services were founded upon the very allegations of sexual misconduct which were purportedly revealed to the therapist in the course of Melissa's therapy and, further, upon the report of June 13, 1990. Unexplainedly, the concurrent Child Abuse and Neglect Petition presented by the Department of Social Services in respect of the child Jaclyn rests upon the same allegations and report, notwithstanding that

Jaclyn was not the subject of evaluation or psychotherapy or, so far as is known, a written report.

Thus, the opinions presented by Mrs. Layish to the court in the current proceeding in which the respondent seeks to persuade the court that Melissa has suffered sexual abuse at the hands of the petitioner, necessitating that all further contact between them be enjoined, are founded upon the very matters presented to and found insufficient by the Family Court earlier this year, augmented by nine subsequent psychotherapy sessions, the last of which (on August 2, 1991) was videotaped. The total period of Mrs. Layish's evaluation and treatment of Melissa is, however, to be viewed in the context of the facts and circumstances disclosed by other evidence which affects the marital litigation and its history and the years of hostility between the parties that bears so directly upon their two children.

The respondent's September 1989 complaint in the divorce action alleges various instances of cruelty on the part of the petitioner directed against the respondent and children. It does not allege, directly or indirectly, his sexual abuse of the children. Grounds for those allegations, it is said, did not arise until two months later. The defendant's October 1989 answer, however, includes allegations of adultery committed by the respondent. Each pleading seeks, *inter alia*, custody of the children as part of the demanded relief. It would appear from the respondent's testimony on this hearing that her principal ground of divorce as pleaded rests upon a number of alleged instances of spousal abuse of a physical nature which antedate the action and which at the time of their occurrence required that she obtain or threaten to obtain

orders of protection to safeguard her husband's actual or potential aggression. It further appears that violent arguments were taking place in the household with increasing frequency.

While the defendant's counterclaim grounded upon adultery was met by the respondent's formal denial of such adulterous conduct on her part, her adultery in 1988 was a fact subsequently conceded both extrajudicially and in her testimony before this court. Thus, knowing in October of 1989 that which she was later to admit about her own conduct, the respondent in November of 1989 "discovered" facts from which she formed the suspicion that sexually abusive conduct on her husband's part might have been responsible for her three year-old daughter's knowledge of and involvement in a "doctor game". She then reported the suspected practice to police authorities and to the office of Child Protective Services, thereby setting in motion the child's evaluation and continuing therapy, related proceedings in the Family Court, including the trial of the Child Abuse and Neglect petitions, and the matters presently considered by this court.

It is of note that the chain of events and proceedings initiated by the respondent at the end of November 1989 arose in the course of unsuccessful efforts she had already undertaken in the Family Court to limit the petitioner's access to their children and followed by a matter of days her on-record courtroom outburst against Judge Ryan in the Family Court when it appeared that he was about to deny her application to bar the petitioner from the marital residence. It is therefore relevant to observe that the investigation and evaluation of the charges coincided with the separation of the parties and with the

commencement of the period when the respondent assumed virtually exclusive care and control of the children. Indeed, by January 18, 1990, the petitioner was restricted by Family Court order to supervised Sunday visitation. Moreover, the history of visitation after that date has been marked by quarrelsome incidents and a lack of cooperation on both sides which has thwarted the visitation arrangement. In any event, visitation effectively ended when the respondent on June 1, 1991 moved with the children from the marital residence to an undisclosed location for the "protection" of the children. Petitioner has not seen the children since June 23, 1991 due to the nondisclosure of their whereabouts and the pendency of these charges.

For the past two years Melissa has met regularly – weekly, where possible – with Yael Layish at North Shore University Hospital. Most of the sessions have been preceded or followed or accompanied by discussions between Mrs. Layish and the respondent who, on bringing Melissa to the hospital, has regularly informed the social worker of those events and circumstances which are perceived as being relevant to establishing and confirming that the child is a victim of her father's abuse, suffers the effects thereof and requires continuing therapy for it. That such efforts may also be in furtherance of a litigation purpose seems evident even if denied. Anomalously, the respondent testified that as recently as June and July of this year she urged her unwilling children to accompany their father on visitation days despite repeated graphic protests allegedly made by Melissa that she feared she would be touched inappropriately by him. To encourage visitation in those circumstances and in

light of opinions formed by the therapist after one and one-half years of treatment seems inconsistent at best. This, however, is but one index that an ulterior objective underlies this litigation.

Given that the child's care, tutelage, guidance and direction has been virtually, if not exclusively, within the control of the respondent for the past 2 1/2 years, that the child is likely to impart to the therapist that which she has been conditioned to impart and that each social worker-child therapy session involves input by the child's mother which cannot be viewed as a detached benign offer of helpful information, the conclusion must be considered that the findings derived from the therapy program, which have now been proffered in support of two separate judicial proceedings to achieve the same purpose, are findings which have been extracted from the process in order to justify the precipitous action taken by the respondent to succeed in matrimonial litigation despite acknowledged marital misconduct.

What the respondent has accomplished thus far is not inconsiderable: she has been engaged in a meretricious relationship outside the marriage for the past three years, on a regular basis for the past two years; she has effectively removed the petitioner from the marriage by commencing not merely the divorce action but also various ancillary proceedings; she has effectively interrupted and later barred any interrelationship between the petitioner and his children by obtaining circumscribed visitation; she has interposed the spectre of child abuse to demonstrate the petitioner's unfitness to be with his children. All without a single effort to move this 30-month old divorce action to its resolution on the merits.

The court is fully mindful that Yael Layish's testimony provides a record of certain of Melissa's elicited expressions and responses at ages 3, 4 and 5 which, if accurately descriptive of acts to which the child was subjected, would profoundly shock the conscience. Her demonstrations, playouts and verbal depictions, however, even if accurately noted by the therapist, cannot be assumed to represent actual experiences to which neither the child's imagination nor her mother's suggestions or prompting contributed. As has been stated, Melissa's euphemistic anatomical terms were not of her own making but were supplied by her mother; and the child's use of dolls to demonstrate sexual games was employed by her mother before they were introduced in session by Mrs. Layish. Moreover, when a particularly heinous act of abuse was reportedly disclosed in the session of March 21, 1990 – a session upon which Yael Layish places much reliance for her opinion that the petitioner abused the child – it was also stated by Melissa, in response to the therapist's question as to where the act occurs, that "it happens in Mommy's room but Daddy isn't there". Yet the child's statement is not deemed exculpatory or inconsistent. Reasonably, a question is raised as to whether, on that critical date, Melissa, with the innocence and simplicity befitting her age, was not simply furnishing an unrehearsed truthful detail to a rehearsed fabrication.

It is also seen in much of the therapy reporting that Melissa voices or plays out the anomaly of "two Daddies", her real father and her mother's paramour, Barry Roberts, whom she refers to as "Baba". Mrs. Layish's testimony and the therapy progress notes are replete with

entries referring to this duality and the confusion engendered in the mind of a child of tender years by supplanting her father, toward whom her mother is embittered, with one who has become a father figure.

Finally, although it is denied by Yael Layish as a factor in producing the condition of stress for which Melissa is said to require continuing therapy, it is deemed causative in the court's view that the child suffers certain effects from the intrahousehold turmoil and argumentative environment to which she was exposed in the 12 to 18-month period preceding the respondent's complaints in December of 1989 and from the numerous incidents of dispute involving visitation thereafter. Subjecting the child to such vitriolic, opposing forces, where each seeks to gain her favor, would seem at least equally plausibly to account for so protracted a history of sleep problems, nightmares, fears and behavioral abberations.

It is worthy of note that Yael Layish, a social worker, treated Melissa for eight months before the child was seen for psychiatric evaluation on September 6, 1990. The report of Dr. Nina Gurevich on that date (Exhibit 1, hereinabove referred to) does indeed diagnose Melissa's symptoms as "Post-Traumatic stress disorder", the psychiatrist noting at length the behavioral manifestations found by Yael Layish; and Dr. Gurevich observes further that the persistence of Melissa's symptoms "suggests that distressing events in her life were very severe and continue to occur. *It is obvious, that Melissa remains very much caught up in her parents' conflicts* (emphasis added)."

Dr. Gurevich then notes that "*alleged* sex abuse" (emphasis supplied) has been assigned as the child's

"initial psychosocial stressor", which renders treatment difficult. However, Dr. Gurevich makes no finding in her report of September 6, 1990, or at any other time, that the child in fact was sexually abused. More importantly, while recommending continuing psychotherapy for the child, Dr. Gurevich simultaneously advocated an "educational approach for Melissa's mother to help create [a] more structured and consistent environment at home and help her understand Melissa's developmental needs. * * * The most important intervention would be creating a safe environment for her".

In the elapsed year between Dr. Gurevich's assessment and diagnosis and the time of the hearing before this court, it does not appear that any measures have been adopted by the respondent to create the recommended home environment. Assuredly, that objective is not fostered by the respondent's open relationship with Mr. Roberts.

The history of the parties' marital relationship, coupled with the ensuing course of litigation since the middle of 1988, persuades this court that the cross-petition is disingenuously motivated. Adequate proof that sexual abuse was committed by the petitioner is lacking. The proof rests virtually exclusively upon the psychotherapy sessions of March 12, 1990 and March 21, 1990, amplified by such further interpretations as Mrs. Layish has attached to her professional time with Melissa in the course of 50 other sessions. Neither the content of the videotape of the August 2, 1991 session nor the court's interview of Melissa on September 23, 1991 provides corroboration or further evidence of abuse. Both involve

elements which reflect a degree of preparedness and a lack of spontaneity.

While this court, on the evidence presented, is unable unequivocally to rule out the possibility that Melissa was sexually abused, that conclusion is subordinate to the court's finding that there is no direct evidence of such abuse and that the respondent has failed to prove by other sufficient evidence her allegations that the petitioner father abused his child or children. Persistent is the unproven possibility that such allegations may have served a tactical litigation purpose.

Notwithstanding the foregoing findings, it is clear that all professional recommendations advanced thus far have countenanced some form of supervised visitation, although no visitation has transpired in almost six months. It is also obvious that the Sunday visitation schedule formerly in effect, which required supervision by the petitioner's mother, produced hostilities which must be deemed inimical to the best interests of the children.

Accordingly, while the court proposes to grant the petitioner visitation with his children, such visitation, at least on an interim basis, must be subject to other and different terms. Until further order of the court, petitioner shall have weekly visitation with his children, Melissa and Jaclyn, at E.A.C., Inc. (Supervised Visitation Program), which visitation will be arranged and supervised by said agency at 50 Clinton Street, Suite 101, Hempstead, N.Y.

Within 10 days after service of the order to be submitted herein, the parties shall contact E.A.C. for a pre-

service interview to establish the dates and hours of petitioner's visitation with the children and to establish the means by which the children shall be brought to and picked up from the place of visitation. If such arrangements are not agreed upon by the parties, the court upon further application will direct the terms of such visitation.

After such visitation has been exercised and in effect for 60 days, the court will entertain such further application as may be appropriate to modify the visitation here prescribed.

In accordance with the foregoing, so much of the petitioner's writ of habeas corpus as seeks temporary custody of the children is denied. Said writ is granted to the extent hereinabove specified insofar as petitioner seeks visitation.

Respondent's cross-petition is granted to the extent she is granted temporary custody of the children and is otherwise in all respects denied.

This constitutes the decision of the court pursuant to CPLR §4213.

All motions not otherwise specifically decided herein are deemed denied.

Submit order.

/s/ J. Burke
J. S. C.
X X X

**FAMILY COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

CASEWORKER: G. Serrano
CPS/Unit 132
571-5217

In the matter of a Proceeding under Article 10 of the Family Court Act Department of Social Services o/b/o

**JACLYN PAPA, b. 5/14/87**
**MELISSA PAPA, b. 1/29/86**
CASE #415865

Petitioner

-against-

Robert Papa

Respondent

Index No. N 375, 376 - 90

**PETITION FOR MODIFICATION OF AN ORDER OF PROTECTION MADE BY FAMILY COURT**

**TO THE FAMILY COURT:**

The undersigned respectfully shows:

1. That Respondent *Robert Papa* resides at *76 Commonwealth Ave., Massapequa, NY 11758.*

1a. That Petitioner's representative, *Maureen McLoughlin,* Director, Children's Protective Services, is employed at Massa County Department

of Social Services, County Seat Drive, Mineola, New York 11501.

2. That heretofore on the *26th* day of *October 1994* an Order of Protection was made by the Honorable George K. Decker in this Court and it was ORDERED, that Robert Papa shall observe the following conditions of behavior: Respondent Father is to remain away from the children Jaclyn and Melissa, except as authorized by the Department of Social Services. In no event shall there be any contact between the respondent and the child Melissa until the respondent engages in appropriate therapy for sex abusers and the therapist for the child consents to supervised contact.

3. That said Order has not been modified and is now in full force and effect (except for the following modification):

4. That the present status of the compliance/noncompliance with the Order is as follows:

Compliance

*5. That the said Order also contained an Order of Visitation pursuant to the applicable provisions of the Family Court Act, as follows:

6. That since the entry of the last Order herein there has been a change of circumstances in that:

Mrs. Papa and the children continue to reside in Upstate New York. This Department does not wish to extend the terms of two Orders of Disposition dated 10/26/94, which provide for supervision of Mr. Papa.

However; as Mr. Papa has remained in denial and not engaged in Sex Abuser therapy as mandated; this Department is concerned for the safety of the children.

7. That by reason of said subsequent change of circumstances the said Order of Protection of the Family Court should be modified in the following respects:

The Order of Protection should be modified to read, no contact between Mr. Papa and the children until each child reaches 18.

8. That no previous application has been made for the relief herein requested (except)

**WHEREFORE,** Petitioner respectfully prays that the said Order be modified as set forth herein and for such other relief as to the Court may seem just and proper as the law provides.

/s/ Maureen McLoughlin
Petitioner – D.S.S. by
Maureen McLoughlin,
Director
Children's Protective
Services
Nassau County Dept. of
Social Services

## VERIFICATION

STATE OF NEW YORK ) ss.:
COUNTY OF NASSAU )

---

says that I am the Petitioner's representative in the foregoing action; that said application is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

/s/ Maureen McLoughlin
Petitioner – D.S.S. by
Maureen McLoughlin,
Director
Children's Protective
Services
Nassau County Dept. of
Social Services

Sworn to before me this
13 day of October 1995

/s/ Suzanne Shyab
Notary Public

SUZANNE SHYAB
[seal] Notary Public, State of New York
No. 30-4823824
Qualified in Nassau County
Term Expires March 30, 19___

---

Supreme Court, U.S.
FILED
DEC 22 1995

No. 95-819

In The

# Supreme Court of the United States

October Term, 1995

ROBERT P. (Anonymous),

*Petitioner,*

v.

IN THE MATTER OF
JACLYN P. (Anonymous), et al., NASSAU COUNTY
DEPARTMENT OF SOCIAL SERVICES,

*Respondent.*

**On Petition For Writ Of Certiorari
To The Court Of Appeals
Of The State Of New York**

## RESPONDENT'S BRIEF IN OPPOSITION

KENNETH J. MUNNELLY, Esq.
Counsel of Record and
Law Guardian
425 Kenwood Avenue
Delmar, New York 12054
(518) 475-1734

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Should an appellate court have the authority to reverse a trial court on a question of fact after giving deference to the lower court's findings at trial?

2. Is preponderance of the evidence a constitutionally permissible standard in a child abuse proceeding?

## LIST OF PARTIES

Jaclyn P. (Anonymous) is the Petitioner's seven year old daughter.

Melissa P. (Anonymous) is the Petitioner's nine year old daughter.

Robert P. (Anonymous) is the Petitioner.

Respondent, Nassau County Department of Social Services, is an agency of the political subdivision of Nassau County, New York.

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## STATEMENT OF CASE

On July 5, 1990, petitioner was served with a petition alleging he sexually abused his two daughters. The allegations of abuse were pursued at fact finding only with respect to Melissa. Specifically, it was alleged petitioner engaged Melissa in sexual contact comprising digital penetration of her anus and vagina, touching her breasts and placing his penis inside her mouth. Melissa was three years old at the time of the alleged incidents.

A fact finding hearing was held in Nassau County Family Court and Judge Feiden concluded that the County had not met its burden of proof and dismissed the petition. Specifically, Judge Feiden stated, "It's my finding on the evidence that the allegation of sexual abuse could have happened and it could not have happened and on that basis the evidence was absolutely even and was not – and therefore there was not a preponderance". (App. 26).

The Appellate Division, Second Department, however, reversed Judge Feiden, holding "on balance, our review of the entire record leads us to conclude that the allegations of abuse were established by a preponderance of the credible evidence". (App. 24). The credible evidence relied upon by the Appellate Division consisted of the out-of-court statements by Melissa, expert validation testimony by Yael Layish, a certified social worker, and medical testimony by Dr. Bogard and Dr. Kirschen. The Appellate Division found Ms. Layish's corroborative testimony to be highly reliable, concluded Dr. Bogard's physical findings, while not necessarily indicative of sexual abuse, were consistent with such a finding, and

accepted Dr. Kirschen's opinion that Melissa showed signs consistent with being a victim of sexual abuse. The Appellate Division concluded that the only evidence tending to support a finding that Melissa had not been abused was respondent's denial testimony and the testimony of Dr. Monty Weinstein. (App. 23, 24).

On November 1, 1995, the Court of Appeals affirmed the order of the Appellate Division. New York's highest court concluded that the weight of the evidence more closely comports with the Appellate Division's determination. (App. 3).

## REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the petition does not establish any compelling reasons for granting the writ, as required by Rule 10 of the Rules of this Court. Contrary to petitioner's assertions, the decision of the New York Court of Appeals in this matter does not conflict with *United States v. Raddatz*, 447 U.S. 667 (1980), nor *Santosky v. Kramer*, 455 U.S. 745 (1982).

### I. New York Appellate Courts Only Reassess Credibility After Giving Deference To The Findings Of The Trial Court And Such Practice Does Not Conflict With *United States v. Raddatz*.

Appellate courts in New York State have the authority to review questions of law and questions of fact on an appeal from a judgment or order of a lower court. *See*

Article VI, section 5, N.Y.S. Constitution; N.Y. Civil Prac. L.&R. section 5501(c). Petitioner maintains that New York appellate courts routinely reassess credibility and such practice violates constitutional due process. (App. 7). Petitioner further maintains that the determination in this case rested squarely on an assessment of credibility and if the appellate court had applied deference to the trial court, the determination of Family Court would have been sustained. (App. 8, 9). Both assertions are factually and legally incorrect.

Petitioner would have this Court believe that appellate courts in New York State routinely reassess the credibility of witnesses without any deference to the trial court's findings. That is simply not the law. The Court of Appeals has consistently held that the findings of the nisi prius court must be accorded the greatest respect. *Eschback v. Eschback*, 56 N.Y.2d 167, 173 (1982); *Matter of Irene O.*, 38 N.Y.2d 776, 777 (1975). Respect and deference to the findings of the lower court is based on the fact that the trial judge has the better opportunity to assess credibility. *Layton v. Foster*, 61 N.Y. 2d 747, 749 (1984). Consequently, petitioner's statements that New York appellate courts routinely reassess credibility without seeing the witnesses is misleading because he failed to advise this Court that such determinations are only made after first giving deference to the trial court's findings.

Interestingly, petitioner cites *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, as authority for the proposition that appellate courts in New York may reverse a determination on the facts, reassess credibility and direct the entry of judgment accordingly, without having seen or heard the witnesses.

(App. 7). Petitioner, however, fails to reveal in that case the Court of Appeals acknowledged such authority only after the appellate court takes into account "the fact that the trial judge had the advantage of seeing the witnesses". *Id.* at 499.

Petitioner further misleads the Court when he states New York appellate courts routinely reassess credibility in manners of this sort. (App. 7). *See Matter of Lauren "KK"*, 175 A.D.2d 393 (3rd Dept. 1991) (no basis for disturbing Family Court's resolution of credibility issue in child sex abuse case); *In re Sharrell B.*, 190 A.D.2d 629 (1st Dept. 1993) (Family Court disposition affirmed upon a finding respondent sexually abused his daughter); *Matter of Brandon "UU"*, 193 A.D.2d 835 (3rd Dept. 1993) (respondent guilty of sexually abusing and neglecting his children and Family Court order affirmed); *Matter of Daryl S.*, 180 A.D.2d 639 (2nd Dept. 1992) (Family Court's finding of abuse affirmed); *In re J.S.*, ___ A.D.2d ___, (1st Dept. 1995) (finding that appellant had sexually abused his daughter was supported by more than the required preponderance of the evidence); *Matter of Kimberly R.*, 178 A.D.2d 531 (2nd Dept. 1991) (validating testimony of a child abuse expert constituted sufficient corroboration of the child's out-of-court statement to support determination of the Family Court); *Matter of Scott "X"*, 184 A.D.2d 866 (3rd Dept. 1992) (Family Court's rejection of respondent's testimony as incredible was within its discretion to make as the finder of fact); *Matter of Linda K.*, 132 A.D.2d 149 (2nd Dept. 1987) (the validation testimony of expert constituted sufficient corroboration and Family Court's decision affirmed); *Swift v. Swift*, 162 A.D.2d 784 (3rd Dept. 1990) (after full review of the trial testimony, we

find no reasons to overturn Family Court's specific crediting of the testimony of respondent).

Petitioner submits that if the Appellate Division had given deference to the findings of the Family Court, the determination of Family Court would have been sustained. (App. 9). This statement is disingenuous because the Appellate Division did give deference to the findings of the Family Court. The Court specifically noted, "Although the determination of the trier of fact is entitled to appropriate deference, in this case we find that the weight of the evidence is so strongly in favor of a finding of sexual abuse that the petition should be sustained (cf., *Matter of Linda E.*, 143 A.D.2d 904). (App. 22). The decision of the Appellate Division applied the deference petitioner claims is constitutionally required. The Court simply held the weight of the evidence strongly supported a finding of sexual abuse. Similarly, the Court of Appeals held the weight of the evidence more closely comports with the Appellate Division's determination. (App. 3).

To suggest this case conflicts with *United States v. Raddatz*, 447 U.S. 667 (1980) is simply erroneous. First, contrary to petitioner's position, the Federal Magistrates Act is not a parallel provision to the New York constitutional and statutory provisions involved in this case. The Federal Magistrates Act permits magistrates to hear certain matters and report to district court judges. The act is similar to New York's judicial hearing officer program (JHO's)[1], not to New York's appellate court system.

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[1] See N.Y.S. session laws, ch. 840, L. 1983; *People v. Scalza*, 76 N.Y.2d 604 (1990) (relying on *Raddatz*, Court of Appeals held JHO system is constitutional).

The alleged serious issue left open in *Raddatz* is contained in a footnote wherein this Court hypothesized that it would be questionable for a district court judge to reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal without seeing and hearing the witnesses whose credibility is in question. *Raddatz* at 681 n. 7.

This case does not involve the findings of a JHO or magistrate whose judicial function is to assist the trial judge in reaching a final determination. On the contrary, this case involves appellate review by four New York State Supreme Court justices and seven justices of the Court of Appeals. These judges are constitutionally and statutorily authorized to review the law and facts on appeal. Such review, must give great respect and deference to the findings of the trial judge who actually saw the witnesses. Such deference was given in the present case. Nevertheless, granting deference to a lower court does not, and should not, mean an abrogation of authority. To hold otherwise would render appellate review meaningless. New York's system of appellate review provides adequate due process and in no way conflicts with *United States v. Raddatz*.

## II. Preponderance Of The Evidence Is A Constitutionally Permissible Standard In Child Abuse Proceedings.

In *Santosky v. Kramer,* 455 U.S. 745, 747 (1982), this Court held that before a State may sever **completely and irrevocably** the rights of parents in their natural children, due process requires that the State supports is allegations by at least clear and convincing evidence (emphasis added). In the present case, Petitioner never faced complete and irrevocable loss of his parental rights. The maximum initial period of separation from his children was one year.[2] *See* N.Y.S. Family Court Act, section 1055 (b)(i). Furthermore, New York law provides for visitation with the children during the placement. *See* N.Y.S. Family Court Act, section 1055 (c).

In *Matter of Tammie Z.,* 66 N.Y.2d 1 (1985), the New York Court of Appeals articulated in detail the difference between abuse and termination proceedings and why the preponderance of the evidence standard in a child abuse proceeding affords due process under the Federal Constitution. Petitioner submits the Court simply distinguished *Santosky* on the ground that an abuse proceeding is different than a termination case. In reality, the Court held that the balance of interests in an abuse case differ materially from a termination proceeding. *Id.* at 4. Not only did the Court point out that termination denies the natural parent the right to ever visit or communicate with the child

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[2] Petitioner is now prohibited from having contact with his children until they reach the age of 18 years because he refused to engage in court ordered therapy for sex abusers. See, App. 50, 51.

again, the Court highlighted an even more fundamental difference, the fact that an erroneous failure to place a child in an abuse case will result in the return of the child to her abuser. *Id.* at 4. *Matter of Tammie Z., supra,* clearly and thoroughly details why a preponderance of the evidence standard affords adequate due process in a child abuse case. New York's highest court reached this conclusion with the knowledge and understanding of the requirements of procedural due process as articulated by this Court in *Santosky v. Kramer.* Consequently, there is no tension between the standard of proof applied in this case and decisions of this Court.

Petitioner also maintains that New York's standard of proof in child abuse cases conflicts with other states. Some of the cases cited by petitioner to support this proposition, however, were termination proceedings. *In re Smith,* 77 Ohio App. 3d 1, 601 N.E.2d 45 (1991) (order granting permanent custody reversed because evidence adduced did not show clearly and convincingly neglect existed); *In re Interest of D.S.,* 217 Ga. App. 29, 456 S.E. 715 (1995) (only under compelling circumstances, found to exist by clear and convincing proof, may a court sever the parent-child custodial relationship). Another case cited by petitioner, *Matter of Schoffstall,* 179 W. Va. 350, 368 S.E.2d 720 (1988) was an adoption proceeding where the court held the only way it could grant the adoption is by clear and convincing proof the father abandoned or permanently relinquished his parental rights. Nevertheless, some states do require clear and convincing proof in child sex abuse cases. *In re Interest of I.M.B.,* 897 S.W.2d 146 (Mo. App. 1995). The fact some states impose a stricter standard of proof does not mean New York's standard

violates the 14th amendment. The relevant inquiry is what process is due in a child sex abuse case. The test to determine what process is constitutionally due involves the balancing of three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

After considering and weighing each of the three due process factors, New York's courts have correctly concluded that the use of a preponderance of the evidence standard in abuse cases does not offend the due process clause. *Matter of Linda C.*, 86 A.D. 2d 356 (3rd Dept. 1982); *Matter of Tammie Z., supra.* In *Matter of Linda C., supra*, the court specifically noted that the effect of imposing a stricter standard of proof upon the State will make successful prosecution of child protective proceedings more difficult. *Id.* at 361. The crucial state interest of protecting children from the inflection of sexual molestation weighs heavily in the conclusion that New York's standard of proof in child abuse cases is constitutionally permissible. If New York's standard provides adequate procedural due process, then it is irrelevant that the legislatures of some other states have chosen to impose a stricter standard.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

December 22, 1995
Delmar, New York

Respectfully submitted,

KENNETH J. MUNNELLY, Esq.
Counsel of Record
and Law Guardian
425 Kenwood Avenue
Delmar, New York 12054
(518) 474-1734

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

ROBERT PAPA,

*Petitioner,*

v.

NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,

*Respondent.*

**Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New York**

## REPLY TO BRIEF IN OPPOSITION

SCHAPIRO & REICH, ESQS.
*Attorneys for Petitioner*

PERRY S. REICH
Counsel of Record
325 East Sunrise Highway
Lindenhurst, NY 11757-2501
(516) 884-7600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## PRELIMINARY STATEMENT

In its opposition, Nassau County erroneously contends that the constitutional issues were not properly raised below and that the New York appellate courts do not undertake a broad review of the facts. Because these contentions are erroneous, this reply brief is necessary.

## ARGUMENT

### A. All of the Constitutional Arguments Were Properly and Timely Raised

Petitioner recognizes the need to show that the Constitutional issues were properly and timely raised in the State court system, especially where, in a State such as New York, an appellate court may not explicitly address the claim because it deems the matter concluded by its prior precedent. *See, Street v. New York*, 394 U.S. 576, 581-585 (1969) (examining the record and determining that the federal question was properly and timely raised). The record shows proper preservation.

The question of the powers of the New York appellate courts to reverse on credibility issues *was* raised in the Appellate Division. Obviously, it cannot be raised in a trial court, because it is not a trial issue. Petitioner claimed in his *appellee's brief* in the Appellate Division that the matter involved a credibility call which was beyond the power of an appellate court to reassess, notwithstanding the substantive rule in New York, discussed below, empowering New York appellate courts to do so.

The issue of the constitutional standard for the burden of proof in this type of proceeding was determined by the Court of Appeals adversely to petitioner's position in 1985, long before the hearing began in this case. *Matter of Tammy Z.*, 66 N.Y.2d 1, 484 N.E.2d 1038, 494 N.Y.S.2d 686 (1985). The trial court, accordingly, deemed itself bound by that holding, and, of course, the point was moot because it dismissed the petition on the basis of the standard of proof permitted by New York statute and *Tammy Z. Cf. Matter of Cerbone*, 61 N.Y.2d 93, 96, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984) (issue of constitutionality of burden of proof moot where same result would obtain under either standard).

Once the Appellate Division *reversed* on the facts, petitioner made a motion for reargument and for permission to appeal to the Court of Appeals in the Appellate Division in which the Constitutional issues were explicitly argued. A copy of that motion has been filed with this Court. Inasmuch as petitioner had not been aggrieved by the unconstitutional nature of the New York system of appellate review, or the burden of proof, because Family Court had held in his favor, he first had standing to raise the Constitutional issues at that point. Thus, at that point, the issues were timely and properly raised. *See, Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930); *cf. Saunders v. Shaw*, 244 U.S. 317 (1917).

Because the order was non-final under New York law, petitioner had to await a dispositional hearing in the Family Court before he could appeal to the Court of

Appeals following the denial of permission by the Appellate Division. Once that hearing was conducted, petitioner filed an appeal as of right, on constitutional grounds, to the New York Court of Appeals, a copy of which was served on the Attorney General as required by N.Y. Executive Law § 71, and which again sought to raise the Constitutional issues. (On both occasions, the Attorney General declined to participate.)

The Court of Appeals dismissed that appeal. New York law proceeds under the same basis as federal law: a dismissal of an appeal for want of a substantial constitutional question is a decision on the merits. *See, Matter of Capoccia*, 59 N.Y.2d 549, 553, 453 N.E.2d 497, 466 N.Y.S.2d 268 (1983); *People ex rel. Lupo v. Fay*, 13 N.Y.2d 253, 256, 196 N.E.2d 56, 246 N.Y.S.2d 399 (1963), *cert. denied*, 376 U.S. 958 (1964). A particularly good illustration of this is *Matter of David A.C.*, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977), where the New York Court of Appeals dismissed an appeal based on a similar challenge to the State's adoption laws. This Court granted certiorari and reversed in *Caban v. Mohammed*, 441 U.S. 380 (1978).

After the petitioner's appeal was dismissed, the Court of Appeals granted permission to appeal. The issues were again raised in the Appellate brief, specifically in the event that review was sought in this Court. A copy of that brief has been filed with this Court.

Finally, if it be necessary, petitioner would make application to the New York Court of Appeals for amendment of the remittitur to show that the issues were properly raised and determined. *See, Ungar v. Sarafite*, 376 U.S. 575, 582-583 (1963).

**B. New York Appellate Courts Reassess Credibility on Cold Record**

In *York Mortgage Corp. v. Clotar Constr. Corp.*, 254 N.Y. 128, 133, 172 N.E. 265 (1930), the New York Court of Appeals, in light of the adoption of a new state constitution, changed the "old rule," found in cases such as *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632 (1930), and held that the New York Appellate Division has powers as broad as that of the trial court in determinations of questions of fact; it is not limited to reversing where the original findings are "clearly erroneous."

That rule is now well-established. Cohen & Karger, *Powers of the New York Court of Appeals*, § 112, at 483-484 (1952) (noting Appellate Division's power is not confined to "clearly erroneous" review, but is rather plenary). As explained in *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 62, 50 N.E.2d 542 (1943), when the "Appellate Division reviews a finding of fact its inquiry is not limited to an examination of whether the finding is supported by some credible evidence, if it appears that upon *all* the credible evidence a different finding would not have been unreasonable. Then the Appellate Division must, like the court at Special Term [the trial court sitting without a jury], weigh the probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony."

Further, contrary to the arguments raised by the Law Guardian, this power is routinely exercised. In the two cases cited by the New York Court of Appeals in this case, *Matter of Sheila G.*, 61 N.Y.2d 368, 386, 462 N.E.2d 11, 474 N.Y.S.2d 421 (1984); *Matter of Hime Y.*, 54 N.Y.2d 282,

286, 429 N.E.2d 792, 445 N.Y.S.2d 114 (1981), the Appellate Divisions reversed on the facts. *Accord, Matter of Tiffany F.*, 205 A.D.2d 429, 613 N.Y.S.2d 631 (1st Dept. 1994). The cases cited by the law guardian by and large involved affirmances of findings made by trial courts.

The settled New York rule of appellate practice, allowing an appellate court to *reweigh* evidence and credibility findings, without hearing and seeing the witnesses, is what we submit violates due process of law.

### C. Burden of Proof

It is evident that the issue of burden of proof was properly raised and is significant in this case. On no theory can the evidence be said to be clear and convincing, if that be the standard that is constitutionally required.

Even the Law Guardian is constrained to concede that the issue is one that has divided the State courts in this country, though he contends that preponderance should suffice.

## CONCLUSION

Since the issues were properly and timely raised in the proceedings below, and the issues are of paramount public importance, the petition for a writ of certiorari should be granted.

Dated: January 9, 1996

Respectfully submitted,

SCHAPIRO & REICH, ESQS.
PERRY S. REICH
*Counsel of Record for Petitioner*
325 East Sunrise Highway
Lindenhurst, NY 11757-2501
(516) 884-7600